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No. 05-7058

IN THE

Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF D.C. PRISONERS' LEGAL SERVICES PROJECT INC., LEGAL AID SOCIETY OF THE CITY OF NEW YORK, OHIO JUSTICE AND POLICY CENTER, PRISON LEGAL NEWS, AND UPTOWN PEOPLE'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act of 1995 ("PLRA") mandates the dismissal of a prisoner's federal civil rights lawsuit, without leave to amend, in the event that the prisoner's complaint does not describe with particularity how the prisoner exhausted his or her administrative remedies; or instead, whether non-exhaustion is an affirmative defense.

2. Whether the PLRA provides a "total exhaustion" rule, which requires the dismissal, without leave to amend, of a prisoner's entire federal civil rights complaint—including causes of action that have been administratively exhausted—for failure to plead exhaustion with respect to any one or more causes of action.

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INTEREST OF *AMICI*[1]

Amici are five non-profit public interest and legal services organizations that focus on protecting the constitutional and fundamental rights of individuals incarcerated in American prisons, including protecting prisoners' right of access to the federal courts to redress civil rights violations.

D.C. Prisoners' Legal Services Project, Inc. (the "Project") is a non-profit law firm dedicated to ensuring the humane treatment and protecting the dignity of all persons convicted of or charged with a criminal offense under the laws of the District of Columbia and housed in prisons, jails, or community corrections programs. The Project files both individual and class action suits to protect the rights of clients, and seeks to assure that prisoners are afforded access to petition for redress of violations of their constitutional rights.

The **Legal Aid Society of the City of New York** (the "Legal Aid Society") is a private organization that provides free legal assistance to indigent persons in New York City. Its Prisoners' Rights Project represents prisoners in the New York City jails and the New York State prisons in litigation protecting their constitutional and other legal rights, and has litigated a number of cases involving the Prison Litigation Reform Act's administrative exhaustion requirement, which is at issue in this case. *See Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004); *Johnson v. Testman*, 380 F.3d 691 (2d Cir.

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[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

2004); *Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003). The Legal Aid Society's Prisoners' Rights Project also has appeared as *amicus* in several prior cases in this Court. *See, e.g., Booth v. Churner*, No. 99-1964, Brief of *Amici Curiae* in Support of Petitioner, 2000 WL 1868111 (Dec. 14, 2000). The Legal Aid Society has an interest in protecting prisoners' individual rights and remedies, as well as its ability to litigate on behalf of its clients, by advocating for appropriate judicial construction of statutes that affect its clients' access to courts.

The **Ohio Justice & Policy Center** (formerly the Prison Reform Advocacy Center) is a public interest, nonprofit law firm dedicated to improving prison conditions and empowering former offenders to become productive members of the community. Established in 1997 and based in Cincinnati, Ohio, the Ohio Justice & Policy Center litigates to enforce constitutional standards regarding medical care, safety and other conditions of confinement, and advises prisoners on how to exhaust their administrative remedies. The Ohio Justice & Policy Center also has worked to educate the Sixth Circuit Court of Appeals about the prison grievance systems that exist in the states comprising the Sixth Circuit. Through its work, the Ohio Justice & Policy Center has emerged as a regional and national expert on various criminal justice issues, prison issues, and prisoners' rights.

Prison Legal News is a non-profit organization that advocates nationally on behalf of those imprisoned in American detention facilities. Prison Legal News publishes a magazine by the same name to educate its readers and the general public about the use of the civil justice system for the vindication of fundamental human and civil rights.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving the poor and indigent of Chicago. Among other things, the UPLC represents prisoners challenging prison conditions, parole procedures, and "good time policies" in the Illinois prison system. UPLC frequently faces the issue of administrative exhaustion, both in its for-

mal litigation (*see, e.g., Westefer v. Snyder*, 422 F.3d 570 (7th Cir. 2005)), and in addressing the hundreds of letters it receives from unrepresented prisoners seeking advice on how to properly exhaust claims.

STATEMENT

The Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996) ("PLRA"), provides that a prisoner who brings a claim under 42 U.S.C. § 1983 must first exhaust the administrative remedies available in the prison system. This case presents the question whether courts are permitted to impose additional, judicially-created procedural rules governing the manner of pleading administrative exhaustion, where such rules interfere with a prisoner's constitutional right of access to the courts and are not a reasonable means of advancing the congressional policies underlying the PLRA. In this case, the Sixth Circuit joined three other circuits in effectively answering this question in the affirmative, resulting in the dismissal of Petitioner's civil rights claims. Had the alleged deprivation of Petitioner's civil rights occurred in one of the several circuits that have declined to impose these additional procedural rules, Petitioner would have been permitted to present his claims to a federal court. This Court's review is necessary to resolve this deepening split among the circuit courts and to eliminate a lack of uniformity that breeds significant and arbitrary differences nationwide in the vindication of prisoners' rights of access to the courts.

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). One of the two principal means for a prisoner to pursue this constitutional right is to file a complaint under the Civil Rights Act of 1871 (as amended, 42 U.S.C. § 1983). *See Muhammad v. Close*, 540 U.S. 749, 750 (2004).

Congress has historically prescribed limits on the ability of a prisoner to pursue a civil rights claim in federal court. Before the passage of the PLRA, a prisoner's right to initiate a civil rights lawsuit in federal court was subject to the provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 ("CRIPA"). In weighing a prisoner's constitutional right of access to the courts against the provisions of the CRIPA, this Court in 1992 explained: "[t]he first of the principles that necessarily frame our analysis of prisoner's constitutional claims is that federal courts must take cognizance of the valid constitutional claims of prison inmates." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

2. In 1996, Congress passed the PLRA, which included a revised administrative exhaustion provision stating that no action shall be brought by a prisoner under 42 U.S.C. § 1983 with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA did not change the principle that federal courts must take cognizance of the valid constitutional claims of prison inmates. *See United States v. Wells*, 519 U.S. 482, 495 (1997) (stating that the Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents"). Rather, as the legislative history reveals, the purpose of the PLRA was to "prevent[] inmates from abusing the judicial system," 141 Cong. Rec. S14611 (1995) (statement of Sen. Hatch), while still "allow[ing] meritorious claims to be filed." 141 Cong. Rec. S14611 (1995) (statement of Sen. Thurmond).

In *Booth v. Churner*, 532 U.S. 731 (2001), this Court held that the language of 42 U.S.C. § 1997e(a) made it clear that Congress mandated administrative exhaustion regardless of whether the relief sought was injunctive or monetary. *Id.* at 741. The Court later explained in *Porter v. Nussle*, 534 U.S. 516 (2002) that, consistent with the overall purpose of the PLRA, the purpose of the PLRA's administrative exhaus-

tion requirement was "to reduce the quantity and improve the quality of prisoner suits." *Id.* at 524.

3. Since *Booth* and *Porter*, the federal circuits have split over the proper interpretation of the PLRA's exhaustion requirement. The Sixth Circuit and three other circuits have added procedural hurdles that are inconsistent with the manner in which this Court in *Booth* and *Porter* reconciled the PLRA's exhaustion requirement with prisoners' right of access to the courts.

The two judicially-created rules at issue in the Petition are: (i) the requirement that a prisoner's lawsuit be dismissed (without leave to amend) for failure to specifically allege exhaustion of administrative remedies; and (ii) the "total exhaustion" rule, which requires the dismissal (without leave to amend) of a prisoner's entire complaint—including claims that have been administratively exhausted—for failure to plead exhaustion with respect to any one or more claims.

4. Petitioner filed a lawsuit under 42 U.S.C. § 1983. He alleged that he was in a motor vehicle accident while in the custody of the Michigan Department of Corrections ("MDOC"). Pet. App. 1a. Petitioner suffered serious injuries, including spinal cord injuries requiring fusion surgery. *Id.* at 8a. Petitioner alleged that after suffering these injuries, the MDOC was deliberately indifferent to his medical needs; assigned him to work as a "Big Yard Equipment Handler," which further aggravated his injuries; and retaliated against him for complaining about his injuries. *Id.* at 8a-9a.

The district court dismissed Petitioner's entire complaint, and the Sixth Circuit affirmed. Even though Respondents conceded that Petitioner did, in fact, exhaust his administrative remedies with respect to at least one of his claims, the Sixth Circuit held that Petitioner's failure to allege exhaustion in his complaint with sufficient particularity man-

dated dismissal of that claim. *Id.* at 2a. The Sixth Circuit then applied a "total exhaustion" rule and held that "even if [Petitioner] had shown he had exhausted some of his claims, the district court properly dismissed the complaint because [petitioner] did not show that he exhausted all of his claims." *Id.* at 3a.

5. As the Petition demonstrates, the Tenth, Eleventh, and Sixth Circuits impose an additional, judicially-created pleading requirement for a prisoner plaintiff, requiring the dismissal of claims, without leave to amend, for failure to specifically allege exhaustion,[2] while seven circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits—have declined to impose this requirement. *See* Pet. at 11-15. Three circuits—the Third, Sixth and Tenth—apply a "total exhaustion" rule, requiring the dismissal, without leave to amend, of an entire complaint in the event that one or more of the claims have not been administratively exhausted.[3] *See id.* at 18-20. The Second, Fifth, Seventh and

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2 *See* Pet. at 11-12 *citing, inter alia, Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 344 (2004); *Baxter v. Rose*, 305 F.3d 486 (6th Cir. 2002); *Rivera v. Allin*, 144 F.3d 719 (11th Cir.), *cert. dismissed*, 524 U.S. 978 (1998).

3 *See* Pet. at 18-19, *citing, inter alia, Vazquez v. Ragonese*, No. 05-1203, 2005 WL 1842273 (3d Cir. Aug. 4, 2005); *Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004).

Ninth Circuits have rejected the "total exhaustion" rule. *See id.* at 20-22.[4]

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision, like the two rulings upon which it is based, cannot be reconciled with this Court's decisions prohibiting judicially created pleading requirements. The Sixth Circuit's decision unnecessarily deprives prisoners of the right to present meritorious civil rights claims in federal court and undermines Congress' purpose in enacting the PLRA. The judicially-created procedural requirements in the Third, Sixth, Tenth and Eleventh Circuits have blocked the constitutional right of access to the courts with a complicated maze of traps for prisoners who seek to vindicate their civil rights.

In requiring a plaintiff prisoner to plead exhaustion of administrative remedies and offer proof of exhaustion in a complaint, or face dismissal without leave to amend, the Sixth Circuit imposed a pleading standard that has no basis in the Federal Rules of Civil Procedure ("Federal Rules") or in the PLRA. The Sixth Circuit's imposition of an affirmative pleading requirement directly conflicts with this Court's rule against judicially-created pleading standards. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). This conflict is even more pronounced here because many PLRA litigants are *pro se*, and this Court has repeatedly recognized that the pleading standards for *pro se*

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[4] The Ninth Circuit rejected the total exhaustion rule in an opinion issued after the Petition was filed. *Lira v. Herrera*, --- F.3d---, 2005 WL 285015 (9th Cir. Nov. 1, 2005).

litigants are more lenient than the pleading standards for represented parties. *See Castro v. United States*, 540 U.S. 375, 381 (2003); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Not only does this additional pleading requirement contradict established law, but it also undermines the PLRA's purpose and unnecessarily prevents prisoners from presenting meritorious civil rights claims in federal courts. The Sixth Circuit's heightened pleading standard is a blunt tool where sharpness is needed: although it may curb frivolous lawsuits, its effect falls equally on meritorious cases as on frivolous ones.

The Sixth Circuit's "total exhaustion" rule is borrowed inappropriately from *Rose v. Lundy*, 455 U.S. 509 (1982), in which this Court adopted such a rule for habeas corpus petitions. The total exhaustion rule in the habeas corpus context furthered the purposes underlying the exhaustion requirement—federal-state comity, and the development of a complete factual record to aid the federal courts. *Id.* at 515, 518-19. Neither rationale supports the adoption of a total exhaustion rule for PLRA cases. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (noting non-judicial nature of prison administrative proceedings).

Further, the total exhaustion rule adopted by the Sixth Circuit is significantly harsher than the habeas rule that is purportedly its model. In *Lundy*, the Court acknowledged that a habeas petitioner should generally be allowed to withdraw unexhausted claims and continue with the exhausted claims, rather than mandating dismissal of the entire petition. *Lundy*, 455 U.S. at 520-21. The Court reaffirmed that view in *Rhines v. Weber*, 125 S.Ct. 1528, 1533 (2005). The *Rhines* Court further noted that Congress had added a statute

of limitations to habeas petitions since *Lundy*, and, in order to avoid forfeiture of meritorious habeas claims, the Court modified the *Lundy* rule to allow courts to stay petitions containing unexhausted claims to permit those claims to be exhausted. *Id.* at 1533-35. Section 1983 actions, too, are governed by statutes of limitations, and the concerns of the *Rhines* Court are equally applicable to such actions.

I. The Court Of Appeals' Judicially-Created Pleading Standard Conflicts With This Court's Prior Decisions And With The Purpose Underlying The PLRA

The circuits are split as to whether prisoner plaintiffs must allege exhaustion of administrative remedies or whether it is an affirmative defense, and further, whether prisoners must plead exhaustion with particularity and with documentary support. *See* Pet. at 11-15. The Sixth Circuit rule is consistent with the rule applied in two other circuits—the Tenth and Eleventh—but inconsistent with the rule applied in seven other circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth. *See* Pet. at 11-15. Not only does the decision below underscore a circuit split, but it contradicts prior decisions of this Court.

1. The decision below is irreconcilable with this Court's decisions that prohibit judicially-created pleading requirements. The Court has held that Rule 8(a)'s liberal notice pleading standard applies to all civil cases, unless the Federal Rules or an Act of Congress expressly provide otherwise. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court prohibited federal courts from imposing pleading standards that are not explicitly authorized by the Federal Rules. With respect to actions governed by the PLRA, neither the Federal Rules nor the PLRA impose any pleading requirement, much

less the heightened pleading standard of the court below. Thus, seven circuits have appropriately held that exhaustion under the PLRA is an affirmative defense to be raised by the defendants, not a pleading requirement. By requiring plaintiff prisoners to satisfy a heightened pleading standard in PLRA actions notwithstanding the lack of statutory authority, the Sixth Circuit disregarded this Court's clear precedent.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Court reversed the Fifth Circuit's imposition of a more demanding pleading standard in actions alleging municipal liability under 42 U.S.C. § 1983. *Id.* at 167. The Court explained that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983." *Id.* at 168. As a result, this Court unanimously held that Rule 8(a)'s notice pleading standard alone governs such complaints, and vacated the Fifth Circuit's decision. *Ibid.*

The Court reiterated this rule in *Swierkiewicz v. Sorema N.A.*, in which it also rejected a heightened pleading requirement for employment discrimination complaints brought under Title VII. 534 U.S. at 508. The Second Circuit held that those complaints must contain specific facts establishing a *prima facie* case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 65 (2d Cir. 2001). This Court reversed the Second Circuit's decision, in part because the judicially-created heightened pleading standard conflicted with Rule 8(a). *Id.* at 512. Referring to *Leatherman*, Justice Thomas wrote for a unanimous Court:

> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule

> 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under . . . 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. at 513 (footnotes omitted). The Court concluded that a requirement of greater specificity for pleading a particular claim could not be judicially created, but would require an amendment to the Federal Rules of Civil Procedure. *Id.* at 515 (citing *Leatherman*, 507 U.S. at 168).

Just as Rule 9(b) makes no mention of municipal liability actions under 42 U.S.C. § 1983 (*Leatherman*) or of employment discrimination actions (*Swierkiewicz*), it makes no mention of actions brought under the PLRA. But despite this Court's clear holdings, the Sixth, Tenth and Eleventh Circuits have imposed a heightened pleading standard in PLRA actions that directly conflicts with this Court's decisions in *Leatherman* and *Swierkiewicz*. In these circuits, plaintiff prisoners bringing PLRA actions must specifically allege that they have exhausted all available state administrative remedies. *See Baxter v. Rose*, 305 F.3d 486, 489-90 (6th Cir. 2002); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998); *Steele v. Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10th Cir. 2003); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998). Following Sixth Circuit precedent, the court below affirmed the district court's dismissal of Petitioner's complaint without leave to amend for failure "to comply with the exhaustion requirement." Pet. App. 3a.

The Sixth and Tenth Circuits' attempts at distinguishing this Court's decision in *Swierkiewicz* are unpersuasive. Both courts have asserted that their adopted pleading standard "do[es] not amount to a judicially-created heightened pleading requirement" (*Steele*, 355 F.3d at 1210; *see Baxter*, 305 F.3d at 490), but rather that it is "Congress, not [the] court, [that] has required a prisoner to plead specific exhaustion information." *Steele*, 355 F.3d at 1211.

Congress, however, has not imposed any such pleading requirement. Rather, what Congress has imposed is simply an exhaustion requirement. Section 1997e(a) of the PLRA simply provides that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Similar mandatory language is used in statutes of limitations, for example, but a plaintiff is not required affirmatively to allege that his or her filing falls within the period of an applicable statute of limitations. Rather, a statute of limitations defense is indisputably an affirmative defense under Rule 8(c). *See* Fed. R. Civ. P. 8(c). Thus, imposition of a pleading requirement on the prisoner plaintiff does not necessarily follow from the mandatory language. Absent express congressional instruction, imposition of such a pleading standard contradicts this Court's decision in *Swierkiewicz*. Both the Third and Ninth Circuits have recognized as much. *See Ray v. Kertes*, 285 F.3d 287, 297 (3d Cir. 2002); *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (9th Cir. 2003). In *Wyatt*, for example, the Ninth Circuit opined:

> [A]s the Supreme Court recently affirmed, we will not impose heightened pleading requirements where Congress has not expressly instructed us to do so. *See Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) . . . . We do not discern in § 1997e(a) the kind of express congressional command referred to in *Swierkiewicz* and exemplified by Rule 9(b). Legislatures know how to indicate that exhaustion

> is a pleading requirement when they want to. [Citation.] The PLRA, of course, contains no such command. [Citation.]

315 F.3d at 1118 (citations omitted).

The Sixth, Tenth and Eleventh Circuits' departure from established law is heightened by the additional requirement, imposed by at least two of these circuits, that plaintiff prisoners "attach[] a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome." *Knuckles El*, 215 F.3d at 642 (citing *Brown*, 139 F.3d at 1104); *see Steele*, 305 F.3d at 1210 (quoting *ibid.*). Here, following *Knuckles El*, the court below affirmed the district court's dismissal of petitioner's complaint because petitioner "neither attached the grievance forms to his complaint nor described the remedies he pursued and the outcome." Pet. App. 2a-3a. Yet nowhere in the Federal Rules or in the PLRA is it contemplated that prisoners be required to attach evidence to their complaints. The requirement, too, amounts to a judicially created pleading hurdle, in contradiction of previous decisions of this Court. *See Leatherman*, 507 U.S. 163; *Swierkiewicz*, 534 U.S. 506; *see also Crawford-El v. Britton*, 523 U.S. 574, 596 (1998) (criticizing "the creation of new rules by federal judges" in the PLRA context).

A heightened pleading standard, when combined with refusal to grant a prisoner leave to amend a complaint, is antithetical to the policy underlying the PLRA. The legislative history of the PLRA vividly illustrates the point that the PLRA was intended to "prevent[]inmates from abusing the judicial system," but was not intended "to prevent inmates from raising legitimate claims." 141 Cong. Rec. S14611 (1995) (statements of Sen. Hatch). While the heightened pleading standard may reduce the total number of prisoner

lawsuits that are adjudicated in federal court, it is no more likely to eliminate frivolous suits than to eliminate meritorious ones.

Because the decision below is based on a heightened pleading standard that contradicts this Court's decisions, will cause the dismissal of meritorious lawsuits, and conflicts with decisions of other circuits, this Court should grant the petition.

II. Importing The "Total Exhaustion" Requirement From Habeas Corpus Jurisprudence Undermines The Purpose Of The PLRA And Prevents Meritorious Suits From Going Forward

The "total exhaustion" rule applied by the court below is based on the inappropriate importation of habeas corpus principles into civil rights litigation. In contrast to the application of the rule in the habeas corpus context, a total exhaustion rule will not advance the purposes underlying the PLRA or its exhaustion requirement. Further, in light of the statute of limitations that applies to § 1983 actions, a total exhaustion rule will operate to bar meritorious claims—even those that have been administratively exhausted.

The circuits are split on the issue of whether the PLRA prescribes a "total exhaustion" rule, requiring a district court to dismiss a prisoner's federal civil rights complaint in its entirety when the complaint contains one or more claims that have not been administratively exhausted—despite the presence of other exhausted claims. The Third, Tenth and Sixth Circuits have adopted a "total exhaustion requirement," and the Second, Fifth, Seventh, and now the Ninth Circuits have rejected this requirement. *See* Pet. at 18-23; *Lira v. Herrera*, —F.3d—, 2005 WL 285015, *9-10 (9th Cir. Nov. 1, 2005).

Circuits adopting a total exhaustion rule have expressly reasoned that this Court's adoption of a total exhaustion rule in the habeas corpus context, *see Rose v. Lundy*, 455 U.S. 509 (1982), justifies the adoption of the same rule in the PLRA context. *See Bey v. Johnson*, 407 F.3d 801, 808 (6th Cir. 2005) ("Because we recognize the correlation between habeas petitions and § 1983 actions, we find it appropriate to interpret the PLRA exhaustion requirement in light of habeas corpus rules."); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189-90 (10th Cir. 2004) (discussing *Lundy* and adopting the total exhaustion rule in the PLRA context). Both the Second and Ninth Circuits have expressly rejected the importation of the habeas corpus total exhaustion rule into PLRA litigation. *See Lira v. Herrera*, ---F.3d---, 2005 WL 285015, *9-10 (9th Cir. Nov. 1, 2005); *Ortiz v. McBride*, 380 F.3d 649, 660-62 (2d Cir. 2004).

1. The importation of habeas corpus principles into the PLRA based on "the correlation between habeas petitions and § 1983 actions," *see Bey*, 407 F.3d at 808, belies the fact that the distinctions between the two areas of law are important and complex enough to have merited this Court's attention in no less than four opinions over the preceding seven years. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004); *Edwards v. Balisok*, 520 U.S. 641 (1997). While the Court has not specifically addressed the exhaustion requirements in these cases, the Court has suggested that the exhaustion requirements for habeas petitions are more stringent than the exhaustion requirements for PLRA actions. *See Muhammad*, 540 U.S. at 751 ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform

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Act of 1995 that administrative opportunities be exhausted first.") (citations omitted).

The rationales underlying this Court's adoption of the total exhaustion rule for habeas corpus petitions do not apply to § 1983 actions. In *Lundy*, the Court explained that the policy underlying the exhaustion requirement in habeas corpus law is federal-state comity. *Lundy*, 455 U.S. at 515 ("[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act."). The Court reasoned that "a total exhaustion rule promotes comity and does not necessarily impair the prisoner's right to relief." *Id.* at 521. In contrast, the Court has recognized that challenges to the conditions of confinement do not raise the same comity concerns as challenges to the fact or duration of confinement raise. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity).

The other rationale for the adoption of the total exhaustion rule in the habeas context was that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Lundy*, 455 U.S. at 518-19. In civil rights cases, there is no analogous requirement that federal courts defer to the findings or legal conclusions of prison grievance administrators. Moreover, this Court has previously noted that prison administrative hearings often will not yield a useful factual record:

> The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of

> proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger v. Saxner, 474 U.S. 193, 206 (1985). Neither of the rationales underlying a total exhaustion rule in the habeas context applies in the PLRA context.

2. In relying on this Court's reasoning in *Lundy*, and adopting a similar total exhaustion rule for PLRA cases, the Sixth and Tenth Circuits have disregarded another key distinction. Because there was no statute of limitations for the filing of habeas corpus petitions when *Lundy* was decided in 1983, the total exhaustion rule did not threaten to extinguish a prisoner's right to bring a habeas corpus petition. At most, it would *delay* a federal court's adjudication of a prisoner's exhausted claims while the prisoner litigated the unexhausted claims through the state court system (or, alternatively, filed a new federal petition containing only the exhausted claims). In contrast, § 1983 claims are subject to statutes of limitations. *See City of Rancho Palos Verdes, California v. Abrams*, 125 S. Ct. 1453, 1460 n. 5 (2005) ("The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts."). Thus, the dismissal of an exhausted § 1983 claim, simply because it is presented along with an unexhausted claim, could effectively *bar* a meritorious civil rights claim forever.

The significance of a statute of limitations to the analysis of the total exhaustion rule, though lost on the Sixth and Tenth Circuits, has not been lost on this Court. In 1996, thirteen years after *Lundy* was decided, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which imposed a one-year statute of limitations for federal habeas

petitions (which is tolled during the pendency of a state habeas petition). In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Court examined the habeas "total exhaustion" requirement for the first time since the passage of the AEDPA. The Court expressly noted the effect of a statute of limitations on the total exhaustion rule:

> As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims.

Id. at 1533. The Court held that if a prisoner had good cause for failure to exhaust a potentially meritorious claim, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests and it would be an abuse of discretion to apply the total exhaustion rule and dismiss a mixed petition. *Id.* at 1535.

The interplay between the total exhaustion rule applied in the Sixth and Tenth Circuits and the statute of limitations applicable to § 1983 claims would have the same results recognized by the Court in *Rhines*—it would force prisoners to "run the risk of forever losing their opportunity for any federal review" of their civil rights claims. *Rhines*, 125 S. Ct. at 1533; *see also Herrera*, 2005 WL 285015, at *10 ("[D]ismissal of the action for lack of total exhaustion could result in an inability to pursue the *exhausted* claim, because of a statute of limitations barrier or inability to pay a second filing fee.").

Even where a dismissal under the total exhaustion rule would not operate to bar a claim on statute-of-limitations grounds, it may still jeopardize a prisoner's ability to pursue a valid claim because it would require the payment of a sec-

ond filing fee. *See* 28 U.S.C. § 1915(b) (requiring that prisoners proceeding *in forma pauperis* pay filing fees in installments). Moreover, the dismissal may constitute a "strike" for purposes of the PLRA's "three strikes rule," which prevents prisoners who have had three actions or appeals dismissed for failure to state a claim, among other reasons, from filing *in forma pauperis*. 28 U.S.C. § 1915(g)).[5] Indeed, the Tenth Circuit, which has adopted a total exhaustion rule, *see Ross*, 365 F.3d at 1189, has also held that dismissal for failure to exhaust administrative remedies constitutes a "strike" for purposes of § 1915(g)). *See Steele*, 355 F.3d at 1213; *but see Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (stating that dismissal for non-exhaustion is not the kind of dismissal contemplated by § 1915(g)).

Because the decision below is based upon a total exhaustion rule that is not mandated by the language of the PLRA, does not advance the policies underlying the PLRA, unduly interferes with a prisoner's right of access to the federal courts, and conflicts with decisions of other circuits, this Court should grant the petition.

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[5] Prisoners who are already subject to the prohibition of § 1915(g) will, if indigent, be barred from court entirely if their properly exhausted claims are dismissed under a total exhaustion rule.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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